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COMMENTARY

GENERAL THOUGHTS ON ADMISSION TO PRACTICE IN THE FEDERAL COURTS OF THE UNITED STATES

ROBERT L. BOGOMOLNY*

I. INTRODUCTION

MEMBERS OF THE LEGAL PROFESSION and the public have been concerned about the quality of practice of law in the courts of the United States. This concern has been emphasized by Chief Justice Burger in remarks concerning the quality of advocacy in the United States¹ and President Carter in remarks about the legal profession.² For many years commentators have been dealing with the questions of what standards should be applied when reviewing performances of lawyers on behalf of various clients.³ Inadequate performance of counsel in criminal cases has been the subject of litigation in a series of cases.⁴ The cases, in part, focus on the standard used for review of ineffective assistance of counsel.⁵ In a few instances, malpractice suits have been utilized to challenge trial performance.⁶ Although the number of cases involving actual suspension from practice by reason of a failure to adequately represent a client, as opposed to some kind of specific episode involving misuse of clients' money, are very few,⁷ complaints to bar associations raising issues about the quality of representation have increased.⁸

The need for improvement in the quality of practice of law has resulted in

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¹ Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORD. L.REV. 227 (1973).

² Tolchin, *President Says Lawyers Foster Unequal Justice*, N.Y. Times, May 5, 1978 at 1A, col. 5.

³ See, e.g., Brewster, *Professional Responsibility: The Lawyers Task of Sisypheus*, 54 MARQ. L.REV. 180 (1971); Holtzoff, *Ethics of Advocacy*, 16 BUFFALO L.REV. 583 (1966); Pincus, *The Lawyer's Professional Responsibility*, 22 J. LEGAL ED. 1 (1969).

⁴ E.g. *Bell v. Alabama*, 367 F.2d 243 (5th Cir. 1966) cert. denied 386 U.S. 916 (1967); *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *People v. Washington*, 41 Ill.2d 16, 241 N.E.2d 425 (1968).

For a discussion of cases dealing with the ineffective assistance of defense counsel see, e.g., Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L.REV. 1, 1-4 (1973); Bazelon, *The Realities of Gideon and Argersinger*, 64 Geo. L.J. 811, 819-24 (1976); Card, *Ineffective Assistance of Counsel — Standards and Remedies*, 41 Mo. L.Rev. 483, 483-99 (1976).

⁵ *Underwood v. Woods*, 406 F.2d 910 (8th Cir. 1969); *Olson v. North*, 276 Ill. App. 457 (2d Dist. App. Ct. 1934); *Martin v. Hall*, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (2d Dist. App. Ct. 1971); See also *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).

⁶ For a discussion of the different areas in litigation in which lawyers have been found guilty of malpractice see Rothstein, *Lawyers' Malpractice in Litigation*, 21 CLEV.ST. L.REV. 1 (1972).

⁷ Arkin, *Self-Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U.MIAMI L.REV. 803 (1976); See Note, *Disbarment in the United States: Who Shall Do the Noisome Work?*, 12 COLUM. J.L. & Soc. PROB. 1, 9-17 (1975).

⁸ See Arkin, *supra* note 7 at 812-13.

a recent tendency to look to two major areas as sources for this improvement. These sources are relatively obvious but need to be restated. The first involves the quality of legal education, particularly in areas dealing with advocacy and adequate representation of clients. The considerable attention given to this area has, in part, been sparked by the introduction of clinical teaching into legal education. In addition, criticism of legal education by both law students and practicing lawyers has led many to question whether that education has been adequate.⁹ The second area involves qualification for admission to the practice of law.¹⁰ Admissions exams have been reviewed to insure that they are adequately related to the necessary screening of persons to practice,¹¹ and to examine whether additional criteria for admissions should be added to the traditional examination and character review.¹²

The most difficult problem is to define the precise nature of the deficiencies in the practice of law in this country. Although the area of practice that has been receiving the most attention is trial practice,¹³ it is by no means clear, nor is there data to support the assumption, that this is the field of law in which the major deficiencies exist. It should be kept in mind that focusing on the deficiencies of trial practice is a limited approach to the problems of lawyering in the United States. Advocacy may well have less impact on our society than the adequacy of lawyers' performance in policy formation, in the creation of legislation, in large corporate practice, in the general practice of law, or in a number of other activities lawyers undertake. Of course there is little existing information available to evaluate quality of performance in many of these areas. Advocacy in the courts is much more visible than most other activities lawyers pursue. Although a decision to review a particular area of law does not necessarily preclude review of all other areas, as a practical matter the thrust of much of the activity directed at reform of advocacy training does present this danger.¹⁴

Questions have been raised concerning the appropriateness of the emphasis on the adversary system in this country.¹⁵ Whether the adversary

⁹ J. SELAGMON, *THE HIGH CITADEL* (1978); Clark, *The Continuing Challenge of Advocacy*, 16 WASHBURN L.J. 243 (1977); Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U.L.REV. 695, 927-63 (1977); Monk, *Mandatory Advocacy Training: Caveat Emptor*, 16 WASHBURN L.J. 584 (1977).

¹⁰ Clare & Frankel, *Qualifications for Trial Lawyers: A Debate*, 48 N.Y.St.B.J. 290 (1976). This article presents two conflicting points of view regarding qualifications for admission to the practice of law. Clare commends the rule requiring that every applicant seeking admission to practice in the Second Circuit demonstrate knowledge in five subject areas: federal procedure, evidence, criminal law and procedure, professional responsibility and trial advocacy. Judge Frankel disagrees that there is such a level of incompetence to warrant such rules and suggests that the real problem might lie with the court or with its system.

¹¹ Frankel, *Curing Lawyer's Incompetence: Primum Non Nocere*, 10 CREIGHTON L.REV. 613, 625-27 (1977); Pedrick & Frank, *Questioning the Clare Cure*, 12 TRIAL 47, 54 (1976).

¹² Huber, *Assuring Attorney Competence: What is to be Done?*, 40 TEX. B.J. 215 (1977). See also, Pedrick & Frank, *supra* note 11.

¹³ *Qualifications for Practice Before the United States Courts in the Second Circuit*, 67 F.R.D. 159 (1975). See also Burger, *supra*, note 1.

¹⁴ See Frankel, *supra* note 11, at 633-39.

¹⁵ Frankel, *The Search for Truth: An Umpireal View*, 123 U.P.A. L.REV. 1031 (1975); Lind, Thibault & Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L.REV. 271 (1976); Thibault, Walker & Lind,

system is the best method of resolving the full range of disputes presented to our courts is a question that should be reexamined.¹⁶ The assumption that equal representation of competing points of view will ultimately lead to an appropriate outcome may be wrong. In addition, it is doubtful that our society presently provides equally skilled attorneys and adequate resources for all parties to prepare for an adversarial confrontation. It is also doubtful that the predictable future will see a major improvement in resource availability since resources for representation of the indigent, the run-of-the-mill criminal and the ordinary middle class citizen are scarce¹⁷ when compared with funds that are available to the federal government and large corporate organizations. Economic limitations necessarily mean unequal ability to prepare and support certain kinds of adversarial approaches. This is not to say that the genius of the American legal system has never produced an opportunity for the relatively unsupported litigant to be successful. All of us know of noteworthy examples where it has.¹⁸ Yet, we also know that the availability of resources in an adversary system too often affects outcome. What is needed is a critical evaluation of all of the proposals for reform of the quality of advocacy in the courts. It is possible that some may miss the central problems of our legal system. Nonetheless, the reform movement is upon us and we should all look with skepticism and care at these reforms lest we delude ourselves with claims of what the problem is and what the reform can accomplish.

II. DEVITT COMMITTEE REPORT

Recently the Chief Justice, in his capacity as Chairman of the Judicial Conference of the United States, formed a committee to consider standards for admission to practice in the federal courts.¹⁹ This committee, known as the Devitt Committee, has been in the process of reviewing and formulating preliminary recommendations concerning qualifications for practice in the federal courts. Although the committee report is not final,²⁰ it has now been made public and submitted to the Judicial Conference for consideration. It seems an appropriate time to begin public comment concerning whether the remedies as presently formulated will indeed satisfy the perceived needs.

The Devitt Committee was charged with reviewing advocacy in the

Adversary Presentation and Bias in Legal Decisionmaking, 86 HARV. L. REV. 386 (1972); Connolly, *The Adversary System — Is it any Longer Appropriate?*, 49 AUSTRAL. L.J. 439 (1975).

¹⁶ Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406 (1968); Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974); Eggleston, *What is Wrong with the Adversary System?*, 49 AUSTRAL. L.J. 428 (1975).

¹⁷ See Frankel, *supra* note 11, at 636-39.

¹⁸ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁹ REPORT AND TENTATIVE RECOMMENDATIONS OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 1978) [hereinafter cited as DEVITT COMM. REPORT].

²⁰ A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS, A REPORT TO THE COMM. OF THE JUDICIAL CONF. OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FED. CTS.*, xiii (Fed'l Judicial Center, Aug. 1978) [hereinafter cited as FJC Study].

federal courts.²¹ As a result of this charge, no specific recommendations were directed toward the issue of defining the nature of the problems of practice in the United States.²²

The approach used by the Devitt Committee to assess the quality of advocacy in the federal courts is of considerable interest. Since we know so little about quantitative measures of qualitative performance in the courts, some attempt, even a rudimentary one, to develop standards to assess trial lawyering is important. The Devitt Committee employed the Federal Judicial Center to gather data on the quality of advocacy in the federal trial and appellate courts.²³ The research done for the committee by the Federal Judicial Center attempted to provide data on three questions:

1. the importance of the problem of inadequate trial and appellate advocacy;
2. whether inadequate advocacy is a more important problem among some segments of the profession than among others; and
3. whether some aspects of trial or appellate performance can be identified as particularly appropriate targets for improvement efforts.²⁴

The Federal Judicial Center constructed survey instruments which were distributed to district court judges and circuit court judges. The judges were asked to evaluate the performance of lawyers who appeared in their courtroom. In addition, a number of questionnaires were administered to judges and members of the bar, asking for their impressions of the quality of federal trial and appellate practice. Federal district judges also evaluated video taped trial performances in an attempt to find out whether there was uniformity of judgment concerning evaluations of trial performance.²⁵

Most district judges in the study believed there was no serious problem of inadequate trial advocacy in their courts. However, a substantial minority felt the problem was serious. The rating survey indicated that 8.6% of the sample performances by lawyers in federal trials were regarded as being inadequate by the rating judges. According to the study, these performances occurred in about 15% of the cases tried. Approximately 17% of the performances were considered adequate but no better. The survey did not indicate how many performances were inadequate according to the standards of a majority or some other number of district judges since the survey was based on individual judges' opinions of cases before them.²⁶

If we examine the study results further, we find that a majority of the judges thought that the most frequent consequence of inadequate presentation by lawyers was failure to fully protect the interest of their clients. About one-quarter of the judges felt that the most frequent consequence was

²¹ *Id.* at 1.

²² *Id.* at 1-3.

²³ *Id.* at xiii.

²⁴ *Id.* at 1.

²⁵ *Id.*

²⁶ *Id.*

impairment of the "orderly, dignified, and efficient conduct of court proceedings." Only about one-tenth believed that the most frequent consequence was the overstepping of ethical bounds.²⁷ It is not clear from the study whether or not adequate preparation and competency were viewed as ethical obligations of the lawyers. This low percentage seems to indicate that they were not.

It is also interesting to note that many judges felt there was a more serious problem among lawyers representing individual clients in civil cases than among other groups. For example, a very few judges believed there was a serious problem among lawyers representing corporate clients in civil cases. The study also indicates that the rate of inadequate performance was thought to be higher among lawyers who practiced alone than those who practiced with others. It was higher among lawyers aged 30 or younger than among those from 31 to 55. Inadequate performance was also perceived to be higher among lawyers who had not had previous federal trial experience than among those who had.²⁸

The majority of judges and lawyers believed that the two most frequent causes of inadequate trial performance were "lack of specialized trial skills or [lack of] knowledge and failure by lawyers to prepare cases to the best of their ability." Very few believed that failure to keep abreast of changes in the law or lack of basic legal ability were the most frequent causes.²⁹

In response to questions about areas of trial competence in which improvement is most needed, those most frequently mentioned by lawyers and judges were "proficiency in the planning and management of litigation" and "techniques in the examination of witnesses." "General legal knowledge" also received many votes as an area in need of improvement but was mentioned much less frequently.³⁰ The survey results in response to inquiry about proficiency in the planning and management of litigation indicated that areas most frequently considered deficient were skill and judgment in "developing a strategy for the conduct of a case," and skill and judgment in "recognizing and reacting to critical issues as they arise." Within the category of "technique in the examination of witnesses," the component areas most frequently mentioned as problematic were "the use of cross-examination," "the use of objections" and "the use of direct examination." The study also pointed out that within the category of "general legal knowledge," the most frequently mentioned deficiency was "knowledge of Federal Rules of Evidence" and "knowledge of Federal Rules of Procedure."³¹

The weakness of the study appears to be that it is a collection of opinion information. Opinion data is only as good as the experts who provide the opinion, and the standards which are utilized in formulating judgments based

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 48.

³¹ *Id.* at 49.

on the answers to the questions. There is no doubt that the federal judiciary and most lawyers practicing in the federal courts are highly skilled and trained people, but it is not certain whether their opinions concerning the adequacy of trial preparation in the courts is a valid measure of competence. Unless competence in the courtroom can be defined and its components listed, evaluations of that competence must remain highly subjective. While subjectiveness need not invalidate a measurement of performance, lack of consistency will. The study attempted to test the consistency of the judges' subjective evaluations by having a number of judges rate four video taped courtroom performances,³² a test which indicated that district judges were not very consistent with one another in rating performances.³³ This factor means that the opinion evidence itself, although of interest, is considerably less compelling with respect to any of the original three questions answered.³⁴ The researchers themselves point out that the data is really more suggestive than definitive.³⁵ It is important not to minimize the value of these findings. Empirical research and careful study in the area of trial advocacy is obviously in its infancy and opinion results help to shed light on the whole field; however, it would be a different matter to say that a series of remedial programs in the trial advocacy area should be based on opinion evidence generated by this particular study.

It is not the purpose of this particular comment to go through the Devitt Report in detail. This can be adequately done by reviewing a copy of the report itself. To attempt to find specific fault with each question or portion of this survey seems to trivialize the importance of the whole area. It is obvious to anyone who has ever worked in the area of survey data that it always has certain deficiencies and is subject to limitation. The issue is whether the major findings, in fact, are so specific and so consistent with our general concepts of the way life is, that they necessarily lead to certain kinds of reactions to the data. The problem for educators in the field is whether the subjective judgments are such clear findings that they make obvious need for a program for future action which can be pursued as a result of the study.

III. COMMITTEE RECOMMENDATIONS

It seems useful now to turn to the report itself to see how the general data briefly described above has been used to reach conclusions concerning advocacy in the federal courts. The Committee Report recommends that a uniform rule be adopted requiring an examination in federal practice subjects and that four trial experiences in actual or simulated trials be required prior to admission to practice.³⁶ In addition, the Committee Report suggests creating

³² *Id.* at 20-23.

³³ *Id.* at 29.

³⁴ See text accompanying note 24, *supra*.

³⁵ FJC STUDY, *supra* note 20 at 29-30.

³⁶ SUPPLEMENT A, REPORT OF THE SUBCOMMITTEE ON REMEDIES TO THE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS, (Aug. 1978) [hereinafter cited as SUPPLEMENT A].

a performance review system to review cases of inadequate performance and to encourage improvement.³⁷ It further suggests a series of other recommendations including greater availability of trial practice courses in law schools, student practice rules, expansion of continuing education programs, federal practice programs, improvements of the ABA Code of Professional Responsibility and uniform standards for admission to practice in United States district courts.³⁸

The Devitt Committee Report points out that when the Second Circuit Advisory Committee (The Clare Committee) Report was reviewed, it was subjected to considerable discussion and debate.

The essence of the objections was that the Committee had not established an adequate factual basis in support of the need for the adoption of standards, that the requirement of certain courses would infringe upon the traditional role of law schools and that the remedy would not be responsive to real problems.³⁹

Unfortunately the same criticisms may be made with respect to the Devitt Report. In the Devitt Report itself, there may not be an adequate factual basis in support of the need for the adoption of the standards suggested, and there is no clear evidence that the remedy as suggested would be responsive to real problems.

The report indicates one fact beyond all others: a problem with advocacy in the federal courts is perceived. It is important to get to the roots of this perceived problem to determine its elements and how the perception is related to the actual presentation of cases in the federal courts. The report indicates that "[i]f one were to give a shorthand definition of the principal deficiency of some federal court practitioners today, it would be that they don't know how to try a lawsuit." The Committee "concluded that there is a need to improve the quality of advocacy in the United States District Courts and that this can best be accomplished by assuring minimum uniform national standards of competency for admission to practice."⁴⁰ The problem with the Committee's conclusion is that there is a significant jump between the assumption that there is a need to improve the quality of advocacy and the assumption that the best way to do that is by requiring minimum admissions standards. There must be an additional step that assumes that required standards somehow will have impact on the perceived problem which may or may not actually exist. The Committee's suggestion that a written examination be required on federal practice subjects⁴¹ raises several issues. The Committee was informed by the National Conference of Bar Examiners that a bar examination could be designed to fairly test the applicant's

³⁷ *Id.* at 2.

³⁸ *Id.* at 1-3.

³⁹ DEVITT COMM. REPORT, *supra* note 19, at 3, quoting from *Qualifications for Practice Before the United States Courts in the Second Circuit*, 67 F.R.D. 159 (1975).

⁴⁰ *Id.* at 8-9.

⁴¹ *Id.* at 9-20.

knowledge of federal practice.⁴² This information apparently led the Committee to conclude that an examination would indeed be a useful activity prior to admission to practice in the federal courts. There is some agreement that a test could be produced which would examine a person's knowledge about federal practice. It is an advantage to know more about federal practice in order to represent clients in the federal courts, but it is doubtful that the National Conference of Bar Examiners multi-state bar exam itself is a successful exam. The exam may exclude some people who are not competent to practice, but, no clear evidence has ever been developed relating bar success to quality of practice. If the bar exams were required to sustain the burden that many of the IQ tests and qualifications for employment examinations are required to sustain under the EEOC guidelines,⁴³ it is doubtful that they would pass the test. If the present exam is not successful, what would be gained by imposing another test?

In addition, discontent with respect to the quality of practice focuses on practitioners, all of whom have successfully passed bar exams and have successfully been initiated into the group of lawyers entitled to practice in the courts of the United States. Although the Devitt Report perceived lack of knowledge as an important cause of the perceived inadequacy, it was not the most important element.⁴⁴ It is not that one ought to be opposed on principle to examinations for admission to practice. Although examinations are costly and time consuming, they seem to be relatively harmless. It is, rather, the assumption that these examinations will relate directly in some manner to the quality of practice in the federal courts that is troublesome. It is doubtful that exams, even if effective, will greatly affect the quality of practice for years to come. Because the Committee suggests that persons already qualified to practice should be exempted from these exams,⁴⁵ most of the practitioners in the federal courts, for the next several years, will not take these examinations. The Committee itself points out that

[t]here was some dissent mainly on the grounds that the survey listed lack of knowledge in third place in the order of deficiencies, that there is no known correlation between passing examinations and improving advocacy, and that the cost does not justify the benefit. The major rebuttal offered was that knowledge is a precondition to development of advocacy competence.⁴⁶

There is no doubt that we have a general view in this country favoring additional education. Nonetheless, based on the evidence of the survey and the position stated by dissenters to the report, it would be a mistake to assume that we are remedying in any significant manner the problem perceived by

⁴² *Id.* at 10.

⁴³ Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-.14 (1978); *see, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

⁴⁴ FJC STUDY, *supra* note 20, at 46, Table 27; DEVITT COMM. REPORT, *supra* note 19, at 11, n. °.

⁴⁵ DEVITT COMM. REPORT, *supra* note 19, at 11.

⁴⁶ *Id.* at 11, n. °.

requiring an exam. Indeed, the harm of the exam may be not only in the inconvenience and cost to those who want to take it, but rather even more importantly in the assumption that we have mastered a problem. With a lack of evidence in the relationship of the examination to the ultimate outcome of practice, there is no reason to assume that an exam will have impact upon the practice of law in the federal courts. Ordinarily, to be admitted to practice in federal districts one must pass state admissions tests. Unless the exam proposed by the Committee is much better than the state exam, it will not serve to screen out any more incompetent lawyers than the exams already required.

The Committee points out that demonstrating adequate trial skills is much more difficult than examining knowledge of federal practice. Based on common judgments that experience will improve lawyers' skills, together with the absence of adequate methods for examining trial skills, the Committee decided to recommend that trial experience be required prior to admission to practice.⁴⁷ In support of this position the Committee cited its study which indicated that previous federal trial experience seemed to decrease the negative response of judges who rated performance.⁴⁸ Once having taken this position the Committee was faced with an almost overwhelming problem. Since there is no commonly accepted way for developing trial skills and since many different ways are presently used, including second-chairing an experienced litigator, beginning with minor cases to get basic experience, observing a significant amount of trial activity, or even participating in certain law school experiences which involve actual trials, the Committee decided that it would attempt to create a composite measure which would be the minimum experience required for admission to the federal courts.⁴⁹

The members of the Committee selected a number of trial experiences which would be required before a person could be admitted. They also suggested that the experience required be limited in order not to make the requirement too onerous. They suggested:

a uniform qualification which, in addition to requiring a showing of knowledge of federal practice subjects through an examination, would also as a condition of trying cases require four experiences of some combination of contested testimonial trials in a federal or state court of record, simulated trials in a law school or post law school program, or of a supervised observation of federal court trials, and that at least two would involve participation in actual trials. In order to offset any lack of opportunity for satisfaction of the experience requirement, an inexperienced lawyer would be able to appear under supervision of an experienced member, or the experience requirement would be subject to a *pro hac vice* waiver on a showing of good cause in pursuit of a client's interest.⁵⁰

⁴⁷ DEVITT COMM. REPORT, *supra* note 19, at 12.

⁴⁸ *Id.*, citing FJC STUDY, *supra* note 20, at 119-27, Tables 21-24.

⁴⁹ *Id.* at 13.

⁵⁰ *Id.* at 15.

In justification of this finding, the Committee pointed out that it is common knowledge in the profession that experience plays an important role in shaping competence.⁵¹ All of us in legal education agree and believe that experience is related to the ability to perform a complicated task such as trying a criminal case adequately. It would be unthinkable to strongly oppose an experiential requirement. At the same time there is significant doubt that the experiential requirement suggested, or any that could be easily devised, would solve the problem. A few relatively simple observations can be made which support this conclusion. First, numbers of lawyers who are generally considered incompetent to perform the tasks they undertake have had significant and substantial experience in the practice of law. Indeed their poor quality and their bad experiences reinforce each other and produce an incompetent lawyer. Second, the nature of experiential training is poorly understood both by the law schools and by the general practitioner; so merely to mandate experiential training without having an idea of what the structure or content of that training ought to be will not necessarily produce a better product. Legal educators have been dealing with this problem in a different setting and it raises issues of considerable concern. Everyone is aware of the clinical experiences now offered by many law schools. There is a major debate over whether clinical experience should be kept within the four walls of the law school where it can be carefully controlled and monitored, or whether simple outplacements similar to the old apprenticeship system can, indeed, work.⁵² The criticism of the apprenticeship system, which can be absolutely superb when well done, is that it is very difficult to control. While good apprenticeships are excellent, poor apprenticeships are very bad because they teach the lawyer bad habits and involve him in a form of practice that we all prefer to have fledging lawyers avoid. The other problem is that the expense of first rate experiential training is substantial.⁵³ Law schools work under a model that assumes large classes and a relatively "efficient" training. Experiential training when well done should involve an intensive, one-to-one relationship, or should be conducted in very small groups and carefully monitored and controlled. The assumption that simply exposing people to a minimal experience will improve the quality of advocacy is a doubtful one considering the nature of trial experience, the kind of issues presented, the difficulty of the procedural material, and the variation of trial advocacy. Once again, this is not to say that some experience among lawyers is not useful, but rather the concern is that we will substitute this reform for more meaningful or carefully delineated work which could lead to a better outcome.

IV. GENERAL THOUGHTS ON ADVOCACY

Having been critical of conclusions based on subjective opinions by the Devitt Committee, let me engage in some opinion and unsupported statements which also seem to require consideration. It is possible that the

⁵¹ *Id.*

⁵² Gee & Jackson, *supra* note 9 at 841-963.

⁵³ Clark, *supra* note 9, at 244; Burger, *supra* note 1, at 232; Gee & Jackson, *supra* note 9, at 717.

major problem of trial practice is not lack of skills or lack of knowledge, but rather lack of dedication and commitment to the particular case undertaken. This lack of commitment and dedication may, among other things, be fostered by economic considerations, by lack of initiation into the expectations and duties of the legal profession, or by lack of energy. Almost no trial task is inherently beyond the ability of a reasonably intelligent, dedicated attorney. That is to say, if the attorney wants to master the art, it is possible to master the art. This leads to the possible conclusion that it is not so much a lack of knowledge nor lack of technical training or experience as it is lack of adequate dedication, time and resources to devote to superb preparation and presentation of trial issues that is the problem. It may be that for many trials adequate preparation is no longer economically feasible given the costs and work of the trial system. If the economic considerations are such that it is not possible to try certain cases adequately, it seems that simply increasing admission requirements will not alleviate the problem. Marvin Frankel's article on the Clare Report raises questions about whether the fundamental nature of the trial system does not contribute as much to the inadequacies of representation as does any other single fact.⁵⁴ In addition, if the need for informational knowledge is at base the cornerstone of the problem, it seems to me that there are other ways to present and cope with the problem that might well be considered. For example, the Devitt Report materials suggest that seminars and educational experiences ought to be made available to the various persons who are going to practice in the federal court.⁵⁵

Although there is some indication in the Devitt Committee materials that there ought to be a professional review committee to deal with instances in which the competence of the lawyer or the performance of the lawyer are below some kind of accepted standards in the courtroom,⁵⁶ this particular idea is inadequately developed. It seems, at base, that the question is one of responsibility. Somehow the profession must come to grips with the question of supervision of trial lawyers. By suggestion in the Devitt Committee that a panel be set up to talk with and review performance of lawyers under certain circumstances⁵⁷ is an interesting one. Indeed the profession must begin to review itself for purposes of competence in a more serious manner. In order

⁵⁴ See Frankel, *supra* note 11. Judge Frankel attributes the problem not to lack of knowledge but to lack of motivation and diligence on the part of the attorney. He further states that the economics of the adversarial approach limit the representatives of indigents to young, inexperienced lawyers, as opposed to the experienced, well-qualified and available to those who can afford it.

⁵⁵ DEVITT COMM. REPORT, *supra* note 19; SUPPLEMENT A, *supra* note 36, at 38-40. One such educational experience was held at the Cleveland-Marshall College of Law of Cleveland State University on October 25-27, 1978. This Lawyer's Seminar in Federal District Court Practice was one of the first and largest seminars of its kind to have been conducted in this country. Among the various speeches and workshops was one on THE FEDERAL RULES OF EVIDENCE by Stephen A. Saltzburg which developed into his article *The Federal Rules of Evidence and the Quality of Practice in Federal Courts*, *infra* at 173.

It may be appropriate to allow local jurisdictions to continue to experiment with special programs like the Northern District of Ohio did, rather than mandate a national solution at this time.

⁵⁶ DEVITT COMM. REPORT, *supra* note 19, at 20-27; SUPPLEMENT A, *supra* note 36, at 40-43.

⁵⁷ *Id.*

to do this, however, serious study has to be undertaken to define the elements of competence and how they relate to trial success.

It seems possible that three different areas can be considered and reviewed in a relatively simple way to help engage adequately in this process. One is the question of basic skills. Are the skills that are needed for trial practice adequately communicated and adequately within the grasp of the party? This is the easy one and the one that has been addressed by the Devitt Committee Report. Unfortunately, it may be the least important. Second, are the resources available to enable the particular practitioner to undertake the representation, considering the circumstances under which he or she works? Third, has there been adequate dedication and investment of time and energy to the preparation and pursuit of the particular client's needs?⁵⁸ All of these require definition and clarity of standards, something which is presently lacking in the legal profession.

V. ROLE OF LEGAL EDUCATION

If we turn from the Devitt Committee study and look at one other aspect that contributes greatly to the quality of lawyering, that is, the quality of legal education, we may find information that could be helpful in dealing with the perceived problem of inadequate advocacy. Unfortunately, there seems to be little precise information about what type of legal education develops high quality lawyer performance.⁵⁹ In fact, the precise goals of legal education have never been very well developed so that review of the quality of such education does not rest on any precise standards. If we all had a clear conceptual view of what the end product of law school should be it would be much easier to engage in a review of this type, yet it is clear that we do not. The criticisms which have been directed toward the Devitt Committee are equally valid when directed toward review of legal education. That is, we are required to rely on general survey opinion evidence and basic perceptions of what is happening within the law schools of this country. That is not to say that our perceptions are wrong or are not helpful, but rather that reliance on such evidence leaves us without any precise determination of what it is we are reviewing and what legal education is all about.

The obvious, often-stated debate about whether law school should be theoretical or practical in orientation, whether an emphasis should be placed on clinical versus other forms of education, and whether law school should consist of two years with a one-year internship, two years with no internship, or three years are simply examples of the fact that we have yet to arrive at any clearly articulated standard of what is an adequate legal education.⁶⁰ It is also clear that operationally we have agreed that three years of law school is the method of choice by legal educators at this point in our history. At any rate, with all of the limitations in mind, there have been some surveys done which are of interest. A recent article in the *JOURNAL OF LEGAL EDUCATION* reviewed

⁵⁸ See Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 932-38 (1976), for forms and suggested methods of examining counsel's preparation.

⁵⁹ See Gee & Jackson, *supra* note 9, at 841-963.

⁶⁰ *Id.*

some prior surveys and conducted a new review.⁶¹ The studies ranged from surveys of recent law school graduates to those who had been out five years to lawyers who have been in practice for a number of years. The review of earlier studies states

in general, these earlier studies suggest that when lawyers consider the influence of their law school on their careers, they are generally satisfied, but would like to see more emphasis on such practical skills as preparing for and conducting trial and litigation work, interviewing and counseling clients, and legal writing.⁶²

The study itself was designed, according to the author, to answer three questions: "(1) What careers and specialization do legally trained people pursue? (2) Which skills and knowledge are most useful in their various pursuits? and (3) What influence did their law school educations have on their skills and careers?"⁶³ The majority of respondents to the study said they engaged in private practice of law and most work in firms. A sizable number pursued careers in law-related positions in government or business. It is the conclusion of the author that an overwhelming majority of law school graduates are actively working in law.⁶⁴ Concerning the questions of what skills and knowledge are more useful to lawyers in their various pursuits, there are some noteworthy results. The law school graduates in the sample suggested that general skills rather than specific areas of knowledge with the exception of statutory knowledge of law were most important. Many of the respondents emphasized the fact that several of the most important skills such as oral communication, writing, negotiations, and counseling were not dependent on legal education.⁶⁵

When the authors examined the skills and knowledge most frequently considered important in legal careers, they found that those most often cited were knowledge of statutory law and the ability to analyze and synthesize law and facts. Next in importance was effective communication and an ability to counsel.⁶⁶ Some interesting parallels can be noted between the results of this study and the other studies on advocacy in the federal courts. Clearly, insofar as advocacy consideration and concerns are related to oral communication skills, the adversary process, counseling and negotiation, there is consistency in the reaction of former law students to lack in training at law school and the opinion of some judges about missing skills noted in the Devitt Report. These consistencies lend support, to some degree, to the Devitt conclusions, or at least if not to the conclusions, to its areas of concern.

⁶¹ Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL ED. 264 (1978).

⁶² *Id.* at 267.

⁶³ *Id.* at 290.

⁶⁴ *Id.* at 292.

⁶⁵ *Id.*

⁶⁶ *Id.* It is also important to note that these skills were considered important by law school graduates at the beginning and middle of their careers as well as by those graduates who had good academic success and average success in law school.

Major criticism of the ability of practitioners focuses on basic skills such as oral advocacy, planning, and, although not often mentioned in the Devitt Report, writing skills. This raises several interesting problems for the legal educator. Granted, the ability to plan a legally adequate effective trial is dependent on improved legal skills, but planning is not an act that one necessarily learns only at law school. Legal planning may be learned at law school, but the ability to organize facts and to move from the factual conclusion to a necessary outcome is something one is trained for all of one's life. In addition, written and oral advocacy skills are not skills solely related to law school. Once again, the ability to advocate a particular position or to write a particular legal document may be different, but the basic ability to speak and write are abilities which normally develop elsewhere and are important in other areas in addition to practicing law. It has become more apparent to legal educators that law students do not come to law school with the oral and writing skills that *might* have been available in past years. Indeed, the general literacy level seems to be less adequate or, at least perceived as less adequate than in the past. It may be that the law school's traditional attitude that it is not in the business of remedial education will have to alter. If, indeed, the students and the ultimate lawyers produced are deficient in basic skills which may not be solely or necessarily learned in law school, it may be necessary for legal educators to stop assuming that these skills will be or should be developed elsewhere and to face what is the difficult problem of training students who are deficient in basic skills needed for lawyering. If this is indeed the case, the thrust of the law school curriculum may have to change.

VI. CONCLUSION

Several general conclusions can be drawn from the Devitt Committee work. First, there is dissatisfaction with the quality of lawyering in the United States. Second, dissatisfaction has been focused on performance in the federal courts to some degree, and on the trial bar more specifically. Third, the dissatisfaction is shared by both judges and lawyers surveyed, many of whom make up the most prestigious part of the federal trial bar. Finally, the survey opinions led the Devitt Committee to a series of recommendations which are not necessarily supported by the opinion survey.

It is undoubtedly true that the causes of discontent with the American judicial system will continue. Irrespective of improved admissions to the federal bar, perceptions of inadequate representation, dissatisfaction with the quality of service and the high cost of service will remain. In the professional areas, the legal profession will continue to be frustrated by its inability to produce better results and to deliver lawyers with better skills who are the cornerstone of the adversary process. The problems with criticisms of American lawyering and with the general conclusions of the Devitt Committee report are that they express a generalized malaise with the way the judicial and trial process proceeds, but fail to focus on the significant and substantial issues that need to be faced. For example, it needs to be asked whether problems with the American trial system are the result of inadequate lawyering or the result of a system which has grown too complex and no longer adequately services the full range of demands that the American

population puts on it. Are the adversarial assumptions true? If they are true, do we as a society have a capability of fulfilling these assumptions? Are the present brand of lawyers being educated in our law schools receiving an adequate education for interaction within the adversarial system? Ought there to be a greater focus on the adversary process in law schools including trial skills, advocacy, oral presentation, counseling, or are we still attempting to produce lawyers for a model based on corporate office practice which may make significantly different demands? Ought law schools continue to educate along the patterns that have been established with a blend of socratic teaching, some practical skills training, and a small increase in clinical education? Should the energies of the profession be directed toward the trial bar as they presently are, or are there other areas of policy and legislative formation, large corporate practice, or government practice to which we might better attend? Can the profession adequately make these decisions based on impression and opinion as it has in the past or must some other method be developed? Are the efforts of policing the profession really adequate or do they to some degree deal with formalistic requirements which are only partially related to improvement of the quality of service? Is the quality of service adequate and acceptable and are the perceived deficiencies simply a reflection that the human endeavor is imperfect?

It is much easier to formulate these questions about the profession and to be critical of the approach taken by the Devitt Committee than it is to come up with a series of answers that will ultimately work to the benefit of the profession and the clients that it serves. Law schools of this country, however, must continue the work that began in the late Sixties concerning the responsiveness and validity of assumptions made about legal training. There is nothing inherently wrong with increasing education, increasing the amount of experience, and continuing to educate lawyers. There is no doubt that the law grows at an enormous rate and that every lawyer requires continued updating and continued study to be adequate to fulfill the needs of the profession. At the same time there seems to be no doubt that a more profound solution is needed and that we should not quickly embrace an endeavor such as the one suggested to the Judicial Conference when it will cure so few of the problems of the profession, require a good deal of energy and manpower, and perhaps divert the profession from its central task of better serving the public and reforming the legal system.

